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28 *Attorneys for Plaintiff Russell B. Toomey*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as chair of the Arizona Board Of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Gilbert Davidson**, in his official capacity as Interim Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

Case No. 4:19-cv-00035-TUC-RM (LAB)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO STAY PROCEEDINGS PENDING U.S. SUPREME COURT DECISION IN *R.G. & G.R HARRIS FUNERAL HOMES V. E.E.O.C.*, 2019 WL 1756679 (2019) FILED BY DEFENDANTS STATE OF ARIZONA, GILBERT DAVIDSON AND PAUL SHANNON

Plaintiff Dr. Russell Toomey submits the following Memorandum of Points and Authorities in Opposition to the Motion to Stay filed by the Defendants State of Arizona,

1 Gilbert Davidson, and Paul Shannon (collectively “State Defendants”), Dkt. 41.

2 INTRODUCTION

3 Dr. Russell Toomey brought this case on behalf of himself and a proposed class of
 4 similarly situated transgender individuals, who are categorically denied coverage for
 5 transition-related care to treat gender dysphoria as a result of the State Defendants’
 6 discriminatory health insurance policy. He asserts claims for sex discrimination under Title
 7 VII of the Civil Rights Act of 1964 and claims under the Equal Protection Clause for
 8 discrimination based on sex *and* discrimination based on transgender status. The State
 9 Defendants have filed a Motion to Dismiss (DE #24), which was fully briefed on May 16,
 10 2109, and is currently and awaiting decision. Dr. Toomey has filed a Motion for Class
 11 Certification (DE #28), which has been held in abeyance pending resolution of the Motion
 12 the Dismiss.

13 The State Defendants now ask the Court to stay the entire case—including class
 14 certification discovery and briefing—until the Supreme Court issues a decision in *R.G. &*
 15 *G.R. Harris Funeral Homes v. EEOC*, No. 18–107, at some point in 2020. *Harris Funeral*
 16 *Homes* is a Title VII case that will address “[w]hether Title VII prohibits discrimination
 17 against transgender people based on (1) their status as transgender or (2) sex stereotyping
 18 under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).” *R.G. & G.R. Harris Funeral*
 19 *Homes v. EEOC*, No. 18–107, 2019 WL 1756679 (U.S. Apr. 22, 2019) (Mem) (granting
 20 certiorari). That decision may impact Dr. Toomey’s Title VII claim for sex discrimination,
 21 and it may provide guidance for Dr. Toomey’s equal protection claim based on sex
 22 discrimination. But *Harris Funeral Homes* will have no impact on Dr. Toomey’s equal
 23 protection claims based on transgender status, which are independently subject to
 24 heightened scrutiny. Regardless of how the Supreme Court rules, the parties will have to
 25 engage in exactly the same fact discovery, both for the class certification stage and on the
 26 merits. In the meantime, Dr. Toomey and the Proposed Class continue to suffer irreparable
 27 harm each day they are denied medically necessary care as a result of the State Defendants’
 28 unlawful policy.

1 Because a stay would not conserve any judicial resources and would impose
2 irreparable harm on Dr. Toomey and the Proposed Class, this Court should deny the
3 Motion.

4 BACKGROUND

5 Dr. Toomey is a man who is transgender, which means that he has a male gender
6 identity, but the sex assigned to him at birth was female. (*See* Plaintiff’s Motion for Class
7 Certification (DE #28); Declaration of Russell Toomey, pg. 3). Dr. Toomey’s healthcare
8 coverage is provided by the State of Arizona through a state-sponsored insurance plan (the
9 “Plan”). (See Complaint, DE #1 at Exhibit A, pg. 1- 3). The Plan categorically denies all
10 coverage for “[g]ender reassignment surgery” regardless medical necessity. (*See id.*
11 Exhibit A pg. 56). Transgender individuals have no meaningful opportunity to demonstrate
12 that their transition-related care is medically necessary as it is specifically excepted from
13 the Plan. (*Id.* at ¶36). As a result, Dr. Toomey was denied preauthorization for a
14 hysterectomy on August 10, 2018. (*Id.* at Exhibit G). The denial was based solely on the
15 Plan’s exclusion for “gender reassignment surgery.”

16 On behalf of himself and a Proposed Class, Dr. Toomey challenges the facial
17 validity of the Plan’s “gender reassignment surgery” exclusion, seeking injunctive and
18 declaratory relief. Dr. Toomey’s claims are based on *both* Title VII of the Civil Rights Act
19 of 1964 *and* the Equal Protection Clause of the Fourteenth Amendment. With respect to
20 Title VII, Dr. Toomey contends that the Plan’s categorical exclusion of coverage for
21 “gender reassignment surgery” discriminates against him and other transgender employees
22 “because of . . . sex.” (Pl’s Opp. to Mot. to Dismiss (DE #39) at 5-12). But Dr. Toomey’s
23 claims under the Equal Protection Clause are not based solely on sex discrimination. Dr.
24 Toomey contends that the categorical exclusion of coverage for “gender reassignment
25 surgery” violates the Equal Protection Clause because (a) it is subject to heightened
26 scrutiny as discrimination based on sex and is not substantially related to an important
27 governmental interest (*id.* at 12-13), (b) it is subject to heightened scrutiny as
28

1 discrimination based on transgender status and is not substantially related to an important
 2 governmental interest (*id.* at 13), and (c) it fails even rational-basis review because it
 3 imposes disparate treatment that is not rationally related to a legitimate governmental
 4 interest (*id.* at 13-14).

5 The State Defendants filed a motion to dismiss on March 18, 2019. After that
 6 motion to dismiss was filed and before Dr. Toomey filed his opposition, the Supreme Court
 7 granted certiorari in *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18–107, 2019 WL
 8 1756679 (U.S. Apr. 22, 2019) (Mem), to decide two issues related to Title VII.

9 In his opposition to the Motion to Dismiss, Dr. Toomey explained why the Supreme
 10 Court’s grant of certiorari in *Harris Funeral Homes* should not delay these proceedings:

11 The Supreme Court recently granted a petition for writ of
 12 certiorari to decide “[w]hether Title VII prohibits
 13 discrimination against transgender people based on (1) their
 14 status as transgender or (2) sex stereotyping under *Price*
 15 *Waterhouse v. Hopkins*, 490 U. S. 228 (1989).” *R.G. & G.R.*
 16 *Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, 2019 WL
 17 1756679, at *1 (U.S. Apr. 22, 2019). That grant of certiorari
 18 does not warrant delaying a ruling on the State Defendants’
 19 motion to dismiss. Although the Supreme Court’s ultimate
 20 decision may affect Dr. Toomey’s Title VII claims, it will not
 resolve Dr. Toomey’s Equal Protection claims. Moreover,
 delaying a ruling on the pending motion or otherwise staying
 proceedings in this case would impose irreparable harm on Dr.
 Toomey and those like him each day they are denied care.

21 (Pl’s Opp. to Mot. to Dismiss (DE #39) at 5 n.1). In their Reply Memorandum filed on
 22 May 16, 2019, the State Defendants acknowledged that the Supreme Court had granted
 23 certiorari in *Harris Funeral Homes* but made no argument that this case should be stayed
 24 as a result of the grant of certiorari. (Def’s Reply (DE #40) at 5 n.6).

25 Now—over a month after the Supreme Court granted certiorari and two weeks after
 26 filing their Reply Memorandum—the State Defendants have reversed course and ask this
 27 Court to stay proceedings for almost a year until the Supreme Court issues a decision in
 28

1 *Harris Funeral Homes* at some point in 2020.

2 **ARGUMENT**

3 Under *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936), courts have
 4 inherent power to stay proceedings, but they do not enjoy “unfettered discretion.”
 5 *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir.
 6 2007). In deciding whether to grant a stay, courts must consider (1) “the possible damage
 7 which may result from the granting of the stay,” (2) “the hardship or inequity which a party
 8 must suffer in being required to go forward,” and (3) “the orderly course of justice
 9 measured in terms of the simplifying or complicating of issues, proof, and questions of law
 10 which could be expected to result from a stay.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th
 11 Cir. 1962). The “proponent of a stay bears the burden of establishing its need.” *Clinton v.*
 12 *Jones*, 520 U.S. 681, 708 (1997). And if there is “even a fair possibility” of harm to the
 13 opposing party, the moving party “must make out a clear case of hardship or inequity in
 14 being required to go forward.” *Landis*, 299 U.S. at 255; *Lockyer v. Mirant Corp.*, 398 F.3d
 15 1098, 1112 (9th Cir. 2005).

16 As discussed below, all of the relevant factors weigh strongly against the State
 17 Defendants’ request for a stay in this case. A stay would not conserve judicial resources
 18 because Dr. Toomey and the Proposed Class have independent claims under the Equal
 19 Protection Clause for discrimination based on transgender status. A stay would severely
 20 prejudice Dr. Toomey and the Proposed Class as they continue to be denied medically
 21 necessary healthcare. And the State Defendants would suffer no cognizable hardship from
 22 proceeding with the case.

23 **I. A Stay Would Not Conserve Judicial Resources**

24 Staying proceedings until the Supreme Court rules in *Harris Funeral Homes* would
 25 not conserve any judicial resources. Although the Supreme Court’s eventual ruling in
 26 *Harris Funeral Homes* may have an impact on Dr. Toomey’s claims for sex discrimination,
 27 *Harris Funeral Homes* will not affect his equal protection claims for discrimination based
 28

1 on transgender status. Because Dr. Toomey’s claims under Title VII and the Equal
2 Protection Clause are both based on the same underlying facts, the ruling in *Harris Funeral*
3 *Homes* will not have any impact on the scope of the factual questions related to the
4 underlying claims and class certification question. Regardless of how the Supreme Court
5 rules, the parties will have to spend the same “time, effort, and resources to continue
6 litigating this case through discovery on class certification issues and [Dr.] Toomey’s
7 underlying claims.” Def.’s Mot. 9.

8 Moreover, despite the State Defendants’ assertions to the contrary, Dr. Toomey’s
9 claims under the Equal Protection Clause for discrimination based on transgender status do
10 not rise and fall with his claims under Title VII. The State Defendants cite to *Etsitty v.*
11 *Utah Transit*, 502 F.3d 1215, 1227-28 (10th Cir. 2007), in which the Tenth Circuit held
12 that “[b]ecause [the plaintiff] d[id] not argue there was a violation of the Equal Protection
13 Clause separate from her Title VII sex discrimination claim, her Equal Protection claim
14 fails for the same reasons.” But, unlike in *Etsitty*, Dr. Toomey *does* allege discrimination
15 based on transgender status “separate and apart from” his claim based on sex
16 discrimination.

17 The other cases cited by the State Defendants are even more distinguishable. In
18 those cases, courts held that because the plaintiffs failed *as factual matter* to prove race or
19 national-origin discrimination under Title VII, the plaintiffs also failed as a factual matter
20 to establish a violation of the Equal Protection Clause. In this case, however, the State
21 Defendants are attempting to argue that if the discriminatory exclusion does not *as a legal*
22 *matter* constitute sex discrimination under Title VII, then it also cannot as a legal matter
23 violate the Equal Protection Clause as discrimination based on transgender status. That is
24 illogical, and the State Defendants cannot cite any case supporting such a proposition.

25 **II. A Stay Would Irreparably Harm Dr. Toomey and Other Members of the**
26 **Proposed Class.**

27 The harm that a stay would inflict on Dr. Toomey and other proposed class members
28 also weighs heavily against staying this matter. “Plaintiffs have a strong interest in

1 resolving their claims expeditiously and in vindicating any constitutional or statutory
 2 violations to which they may have been subjected.” *Melendres v. Maricopa Cty.*, No. 07-
 3 CV-02513-PHX-GMSM, 2009 WL 2515618, at *2 (D. Ariz. Aug. 13, 2009). Those
 4 interests are particularly strong in this case because Dr. Toomey and the proposed class
 5 seek injunctive relief for coverage of medically necessary health care. *See Lockyer v.*
 6 *Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir.2005) (finding that a stay was not warranted
 7 where, “[u]nlike the plaintiffs in [other cases], who sought only damages for past harm, the
 8 [plaintiff] seeks injunctive relief against ongoing and future harm.”); *Burrell v. Colvin*, No.
 9 CV-14-0050-PHX-LOA, 2014 WL 3894109, at *1 (D. Ariz. Aug. 8, 2014) (“[C]ourts more
 10 appropriately enter stay orders where a party seeks only damages, does not allege
 11 continuing harm, and does not seek injunctive or declaratory relief as a stay would result
 12 only in delay in monetary recovery.”).

13 The State Defendants attempt to trivialize the harm that a stay would inflict on Dr.
 14 Toomey and the Proposed Class by comparing this case to *Gustavson v. Mars, Inc.*, No.
 15 13-CV-04537-LHK, 2014 WL 6986421, at *1 (N.D. Cal. Dec. 10, 2014), a case in which
 16 the plaintiff sued a candy company because “5 chocolate products that she purchased” were
 17 “‘misbranded’ in violation of federal and California law.” Dr. Toomey’s case is not about
 18 candy wrappers. It is a civil rights case about the denial of medically necessary healthcare.
 19 Courts in this Circuit have long recognized that “the denial of needed medical care is
 20 serious” and “irreparable harm.” *Alday v. Raytheon Co.*, No. CV 06-32 TUC DCB, 2008
 21 WL 11441997, at *5 (D. Ariz. Oct. 2, 2008).¹

22
 23 ¹ *See, e.g., Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (“Plaintiffs have shown
 24 a risk of irreparable injury, since enforcement of [Medicaid] rule may deny them needed
 25 medical care.”); *One Unnamed Deputy Dist. Attorney v. Cty. of Los Angeles*, No. CV 09-
 26 7931 ODW (SSX), 2010 WL 11463169, at *5 (C.D. Cal. Mar. 2, 2010) (“Unlike monetary
 27 injuries, constitutional violations including the disparity in health care costs cannot be
 28 adequately remedied through damages and therefore generally constitute irreparable
 harm.” (brackets omitted)); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 997 (N.D. Cal.
 2010) (“[T]he reduction or elimination of public medical benefits is sufficient to establish
 irreparable harm to those likely to be affected by the program cuts.”); *Newton-Nations v.*
Rogers, 316 F. Supp. 2d 883, 888 (D. Ariz. 2004) (“The Ninth Circuit has found irreparable
 injury established by a showing that plaintiffs may be denied medical care.”).

1 The State Defendants note that Dr. Toomey has not filed a motion for a preliminary
 2 injunction (Defs.’ Mot. at 11) but do not explain why that should affect this Court’s
 3 analysis. As the State Defendants recognize, Dr. Toomey’s claims will require “discovery
 4 on class certification issues and [Dr.] Toomey’s underlying claims.” Def.’s Mot. 9. Dr.
 5 Toomey seeks to proceed with that discovery as expeditiously as possible instead of
 6 attempting to litigate the case on an incomplete preliminary injunction record. By arguing
 7 that the entire case—including discovery—should be stayed, the State Defendants attempt
 8 to create a “Catch 22” where the need for discovery precludes a preliminary injunction,
 9 and the failure to request a preliminary injunction prevents the plaintiff from conducting
 10 discovery. That is not the law.

11 A stay pending the ruling in *Harris Funeral Homes* would also delay proceedings
 12 for an inordinately long period of time. “A stay should not be granted unless it appears
 13 likely the other proceedings will be concluded within a reasonable time in relation to the
 14 urgency of the claims presented to the court.” *Leyva v. Certified Grocers of Cal. Ltd.*, 593
 15 F.2d 857, 864 (9th Cir. 1979). The Supreme Court has not yet scheduled a date for oral
 16 argument in *Harris Funeral Homes*, and it is unlikely that a decision will be issued until
 17 near the end of next year’s term, in June 2020. Although Defendants cite to a few cases in
 18 which courts granted stays for comparable lengths of time, none of those cases involved
 19 ongoing allegations of irreparable harm.² By contrast, if a stay is granted here, the
 20

21
 22 ² See *Audio MPEG, Inc. v. Hewlett-Packard Comp.*, No. 2:15CV73, 2015 WL 5567085, at
 23 *5 (E.D. Va. Sept. 21, 2015) (granting stay because monetary damages will be sufficient
 24 to compensate Plaintiffs for any [patent] infringement”); *Lopez v. Miami-Dade Cty.*, 145
 25 F. Supp. 3d 1206, 1207 (S.D. Fla. 2015) (granting stay in case where plaintiffs sought
 26 damages alleging that defendant violated the Fair and Accurate Credit Transactions Act
 27 “by printing more than the last five digits of credit card numbers on receipts”); *Cent. Valley*
 28 *Chrysler-Jeep, Inc. v. Witherspoon*, No. CVF 04-6663 AWI LJO, 2007 WL 135688, at *14
 (E.D. Cal. Jan. 16, 2007) (granting injunctive relief based on the Clean Air Act and—in
 light of that holding—concluding that plaintiffs would not be prejudiced by stay of claims
 based on Energy Policy and Conservation Act, which sought similar relief); *cf. Cortes v.*

1 irreparable harm that Dr. Toomey and the Proposed Class would experience during the rest
2 of 2019 and most of 2020 would far exceed any illusory benefit to judicial economy.

3 **III. A Stay Would Impose No Hardship on Defendants.**

4 Because Dr. Toomey has demonstrated “a fair possibility” of harm from a stay, the
5 State Defendants “must make out a clear case of hardship or inequity in being required to
6 go forward.” *Landis*, 299 U.S. at 255; *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th
7 Cir. 2005). The only “hardship” the State Defendants point to is “the risk of dedicating
8 substantial resources litigating issues that may ultimately prove unnecessary.” (Def.’s Mot.
9 at 9).

10 Under controlling Ninth Circuit precedent, that is insufficient: “[B]eing required to defend
11 a suit, without more, does not constitute a ‘clear case of hardship or inequity’ within the
12 meaning of *Landis*.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005).³
13 Moreover, as discussed above, the same resources will have to be expended litigating Dr.
14 Toomey’s equal protection claims regardless of how the Supreme Court rules in *Harris*
15 *Funeral Homes*.

16 **CONCLUSION**

17 Because all the relevant factors weigh strongly against a stay, the State Defendants’
18 Motion to Stay should be denied.

22
23 *Bd. of Governors*, No. 89 C 3449, 1991 WL 148181, at *1 (N.D. Ill. July 19, 1991)
24 (concluding that “delay will not unduly prejudice [plaintiff because he is currently
25 employed by defendants at a salary not substantially below what he would receive if he
were awarded the promotion he seeks”).

26 ³ The State Defendants cite to *Lopez v. American Express Bank*, No. CV 09-07335 SJO
27 (MANx), 2010 WL 3637755, *4 (C.D. Cal. September 17, 2010), but in that case the court
28 concluded that any ongoing harm was not irreparable and “may be remedied by an award
of damages.”

1 DATED this 10th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on 10th day of June, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a copy was electronically transmitted to the following:

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